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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,

Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.,

Respondents.

SUPPLEMENTAL BRIEF.

GIBBS L. BAKER,
HORACE S. WHITMAN,
LUTHER ERWIN ANGLE,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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SUPPLEMENTAL BRIEF.

The petitioner relies upon its Brief submitted in support of its Petition for Writ of Certiorari and the Supplemental Brief here respectfully submitted.

The opinion herein of the United States Court of Appeals for the District of Columbia is reported in Advanced Sheets for 98 F. (2nd) 245.

THE COPYRIGHT LAW ENACTED MARCH 4, 1909, U. S. C. A., TITLE 17, DOES NOT REQUIRE THE PROMPT DEPOSIT OF COPIES OF THE WORK, CONTAINING THE COPYRIGHT NOTICE, IN THE COPYRIGHT OFFICE, AS A PREREQUISITE TO THE RIGHT TO MAINTAIN AN ACTION FOR THE INFRINGEMENT OF THE COPYRIGHT OBTAINED UNDER SECTIONS 9 AND 18 OF THE ACT.

The Act of March 4, 1909, Chapter 320, U. S. C. A. Title 17, wrought an organic change in the then existing copyright law. All the several prior acts required deposit

of copies of the material to be copyrighted with a designated depository as a condition precedent to vesting of the copyright. Under Section 9 of the present Act, a person for the first time "may secure copyright for his work by publication thereof with the notice of copyright required by this title."

National Cloak, etc. Co. v. Kaufman, 189 Fed. 215;
New York Times Co. v. Star Co., 195 Fed. 110.

As a result of this organic change, all the world is put on notice of copyright ownership by publication of the work with notice of claim of copyright thereon. Deposit of copies of the copyrighted work provided for in Section 12 of the Act now becomes simply a prerequisite to bringing suit for infringement thereof.

In the case at bar, the article was copyrighted pursuant to the present statute by publication thereof with notice of claim of copyright appearing thereon. The petitioner deposited the requisite two copies and obtained a proper certificate of registration some fourteen months after obtaining its copyright and some six months after infringement thereof by the respondents, and prior to the institution of this suit for infringement. The trial court held that the petitioner had complied with the Copyright Law, even though the deposit of copies and registration were made after the infringement, and that the petitioner's copyright was wrongfully infringed by the respondents, and that the petitioner is entitled to damages therefor (R. 27-30). The United States Court of Appeals for the District of Columbia (hereinafter referred to as the Lower Court) reversed the trial court on the ground that the petitioner failed *promptly* to deposit copies of the article, and therefore could not maintain this suit.

A statute should be construed in accordance with the manifest intent of the lawmaker. Such intent should be ascertained both from the language and context of the Act itself and from the purpose and object for which the statute was enacted.

Section 12 of the Act provides that "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to deposit of copies and registration of such work shall have been complied with." The Lower Court erroneously imported into this provision of the section the word "promptly," which appears in the first part of the section. To fit the word "promptly" into the last quoted part of the section, the Court found it necessary, in effect, to alter the language by changing the word "until," a word of limitation, to "unless," a word of condition. The former Act of March 3, 1891, 26 Stat. Chap. 566, p. 1107, provided that—

> "no person shall be entitled to a copyright *unless* he shall, on or before the day of publication in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, D. C., a printed copy of the title of the book * * *." (Italics ours.)

Whereas under the present Act obtaining a copyright is not conditioned upon deposit of copies although suit for infringement cannot be maintained *until* copies have been deposited.

Section 13 of the Act prescribes the penalty for failure to file copies *promptly;* it reads in part:

> "Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, * * *."

It is significant that here the word "promptly" is used with reference to deposit of copies, as provided in the first part of Section 12; however, in the last part of Section 12, relating to the bringing of suit for infringement, the word "promptly" is not used, although it is used in practically the same phraseology in the first sentence of Section 13 as well as the preceding sentence of Section 12. Had it been intended to require *prompt* deposit of copies as a prerequisite to suit for infringement, the word "promptly" would have been expressly used in that connection.

Section 9 of the Act confers full copyright upon the author upon publication with notice of copyright. This claim of copyright on the publication gives notice to the public of the copyright holder's exclusive right to use and publish. Section 13 provides the sole method of forfeiture of that copyright. Sections 12 and 13 are to be construed together. The decision of the Lower Court renders the penalty of voidance of copyright provided by Section 13, but a hollow threat. By the time the penalty becomes applicable it is no longer possible to *promptly* deposit copies, as such promptness is measured from the date of publication with notice of copyright. As an unenforceable copyright is obviously worthless, the voidance thereof would be an idle gesture.

That Sections 12 and 13 of the statute should be construed together in the manner set out above, is substantiated by the comments on those sections in the House of Representatives' Report No. 2222, 60th Congress, Second Session, page 11, as follows:

> "*Sections 12 and 13 deal with the deposit of copies, and should be considered together.* They materially alter the existing law, which provides that in order to make the copyright valid there must be deposited

two complete copies of the book or other article not later than the date of first publication. The failure of a shipping clerk to see that the copies go promptly forward to Washington may destroy a copyright of great value, and many copyrights have been lost because by some accident or mistake this requirement was not complied with. The committee felt that some modification of this drastic provision, under which the delay of a single day might destroy a copyright, might well be made. The bill reported by the committee provides that there shall be 'promptly' deposited in the copyright office, or in the mail, addressed to the register of copyrights, two complete copies of the best edition then published, and that no action or proceeding shall be maintained for the infringement of copyright in any work until the provisions with respect to the deposit of copies and the registration of such work shall have been complied with.

"If the works are not promptly deposited, we provide that the register of copyrights may at any time after publication of the work, upon actual notice, require the proprietor of the copyright to deposit, and then in default of deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void. It was suggested that the forfeiture of the copyright for failure to deposit copies was too drastic a remedy, but your committee feel that in many cases it will be the only effective remedy; certainly the provision for compelling the deposit of copies by the imposition of a fine would be absolutely unavailing should the copyright proprietor be the citizen or subject of a foreign state." (Italics ours.)

The Decision of the Lower Court is in Conflict With the Decision of the Circuit Court of Appeals of the Second Circuit.

The Federal Courts for the Second Circuit in the leading case of *Lumiere v. Pathe Exchange*, 275 Fed. 428, logically held that Section 12 of the Copyright Law requires simply deposit of two copies of the copyrighted work prior to commencing suit for infringement thereof, as was done in the present case. In the *Lumiere* case, the plaintiff, a photographer, sold in June, 1918, to Dolores Casinelli, a motion picture actress, some pictures of her "marked as copyrighted by the plaintiff." In April or May of 1919, the defendants infringed the plaintiff's said copyright. In August, 1919, the plaintiff deposited two copies of each photograph and obtained a certificate of registration for photographs not for sale. Thereafter on August 26, 1919, the plaintiff sued the defendant for infringement, accounting and injunction. On April 17, 1920, Judge Learned Hand dismissed the bill "without costs or prejudice and with leave to commence a new action. All parties appealed."

After deciding that the plaintiff had a right to copyright the photographs, and that his copyright thereof had been infringed by the defendants, the Circuit Court of Appeals held that the plaintiff's delay of some fourteen months in depositing copies did not preclude his suit for infringement which occurred some four months prior to said deposit of copies. In this connection the Circuit Court of Appeals said, page 430:

> "The plaintiff's copyright was established by the publication with notice of copyright as against all the world whether with or without actual notice and could not be declared void because not 'promptly' followed

> by deposit of copies as required by the act except by action of the register of copyrights under section 13, which was not taken."

That Court then proceeded to affirm the action of the trial court on the ground that the plaintiff's certificate of registration was for photographs not for sale, and to advise the plaintiff that, upon proper registration, the plaintiff might maintain another action for said infringement.

In *Mittenthal v. Berlin*, 291 Fed. 714, Judge Learned Hand, following the Circuit Court of Appeals in the case of *Lumiere v. Pathe Exchange, supra*, said, page 715:

> "* * * The time of deposit is clearly of secondary importance. Even a failure to deposit promptly does no more under section 13 (Comp. St. sec. 9534) than subject the owner to a demand, failure to comply with which exposes him to a fine of $100 and the cost of the two copies which he should have furnished. He may mend his case even in the event of long delinquency. * * *"

In the case at bar, the pertinent facts are almost identical with those in the *Lumiere* case above cited, except that there are no grounds for dismissal even "without costs or prejudice and with leave to commence a new action" because proper certificate of registration was duly obtained. The petitioner deposited two copies and obtained a proper certificate of registration some fourteen months after obtaining its copyright and some six months after infringement thereof by the defendants. Nevertheless the Lower Court reversed the trial court's decree, which held that the petitioner's copyright was wrongfully infringed by the respondents and that the petitioner is entitled to damages therefor (R. 29-30).

The Lower Court and the respondents have practically ignored the facts in the *Lumiere* case. They dwell exclusively upon the matter of inadequate registration which, true enough, was the cause of the suit's dismissal, and utterly disregard material matters of fact and law which the upper and lower courts had to pass upon in order to reach their decision in the case. They seek to distinguish the *Lumiere* case from the one at bar on the strength of Judge Hough's concurring opinion in the former case. It is noted, however, that the other two Judges did not concur with Judge Hough in his limitations of the effect of that decision.

The respondents cite the case of *Ebeling and Reuss, Inc. vs. Raff, Collector, and Wright, Tyndale & Van Roden, Inc.*, 28 U. S. P. Q. 366, as the only one in point. The facts in that case make it wholly indecisive of the present issue. This case involves different sections of the Copyright Law, namely, Sections 1, 11, 30 and 32. The Court's decision on the facts was that the plaintiff had failed to deposit two copies of the copyrighted chinaware prior to institution of its suit and therefore the suit could not be maintained. In referring to Section 12 of the Copyright Law as providing for deposit of copies, the Court quoted the word "promptly." Such is purely *obiter dictum*. It is obvious from a mere reading of the opinion that the Court was in no way concerned with the time element of the deposit of copies, as no deposit of the two copies required as a prerequisite to suit had been made. It is noted moreover that the Lower Court in its opinion in no way referred to the case of *Ebeling and Reuss, Inc. v. Raff, Collector, and Wright, Tyndale & Van Roden, Inc.*

In the *Lumiere* case, on the other hand, in order to reach the decision arrived at, it was necessary to hold, and the upper and lower courts did hold, that under the present Copyright Law it is not necessary to deposit *promptly* copies of the copyrighted work as a prerequisite to suit for infringement of the copyright. As hereinbefore pointed out, all parties appealed from Judge Learned Hand's dismissal of the bill "with leave to commence a new action." Therefore, had not the Circuit Court of Appeals determined that the provisions of Section 12 of the present Copyright Law with regard to deposit of copies as a prerequisite to suit for infringement of copyright, had been met in the *Lumiere* case by the deposit of copies of the copyrighted work, four months after infringement of copyright and fourteen months after the first publication with claim of copyright, (facts almost identical with those in the present case) it would have been constrained to make the matter *res adjudicata* in favor of the defendant by affirming the dismissal by the lower court *without* "leave to commence a new action."

Moreover, neither the upper nor lower court in the *Lumiere* case could have indicated that the plaintiff might renew his suit without having decided that Section 12 of the present Copyright Law does not require *prompt* deposit of copies of the copyrighted work as a prerequisite to suit for infringement of the copyright. Consequently, the decision of the Lower Court is in error and is in direct conflict with the *Lumiere* case.

The English Courts place the same construction upon the corresponding provisions of the English Copyright Law as contended for by the petitioner with respect to the American Copyright Law. Prior to the present British Copyright Law of 1842, it would seem that deposit

of copies and securing of registration was a condition precedent to procuring copyright, but that the Act of 1842, 5 and 6 Vict. c 45, changed the law so as to make deposit of copies and procurement of registration after publication merely a condition precedent to institution of suit for infringement. Section 24 of the British Copyright Act provides:

> "24. No proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceedings in respect of any infringement of such copyright, unless he shall before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company, of such book pursuant to this act: Provided always, that the omission to make such entry, shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid; provided also that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of his late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid."

Although this provision of the British Act is more explicit than the corresponding Section 12 of the American Copyright Law, they are similar in substance. The English Courts' construction of the English Law follow the construction of the American Law urged by the petitioner, and is in accord with *Lumiere v. Pathe Exchange, supra.*

Goubaud v. Wallace, 25 W. R. 604.
Gate v. Devonshire Newspaper Co., 37 W. R. 487.

The Decision of the Lower Court is Untenable and Contrary to the Copyright Law.

There is no justification whatsoever for any innuendo that the petitioner's failure to deposit copies of the copyrighted article was done with malice aforethought to entrap the unwary. The Lower Court in its opinion in the case at bar (R. 35) quotes from the appellant's brief and continues with the following language:

> "And appellee concedes in its brief that no effort was made to deposit copies, as required by the Act, until after counsel were employed to bring suit, thus giving color at least to appellants' innuendo that appellee deliberately waited to see if a financially responsible party would fall into the trap" (R. 36).

And further on in its opinion the same court says:

> "The reasons for promptness of deposit are present today in even greater measure than in earlier years. The liberalizing of the requirement should not be so construed as to defeat its purpose. Appellee's failure to comply with the Act in the present case, coupled with discontinuance of publication of its magazine and apparent abandonment of its copyright, produced just such a result as Section 12 was designed to prevent." (R. 41).

On the other hand Congress in making the organic change in the Copyright Law in 1909, recognized that "the failure of a shipping clerk to see that the copies go promptly forward to Washington may destroy a copyright of great value, and many copyrights have been lost because by some accident or mistake this requirement was not complied with" (H. R. Report, *supra*, p. 11; also see quotation pp. 4 and 5 this brief).

The Lower Court and the respondents are wholly unmindful of the fact that in obtaining its copyright the petitioner gave notice thereof to all the world by publication of the article with notice of claim of copyright thereon. In fact, the respondent, Pearson, had worked with the petitioner through the November, 1931 issue of its publication, and was familiar with the article and publication and knew that the publishing of the article was made under notice of claim of copyright as prescribed by the Copyright Law (R. 5-7; 12-17). Finding of Fact 6 by the Trial Court (R. 28) sets forth that the respondents, Pearson and Allen, published the book, "More Merry-Go-Round" as written by themselves, whereas they took from the "Washingtonian" the entire article written by Rixey Smith and clearly marked on its face with the petitioner's claim of copyright, and published it as a chapter purportedly written by them in their said book "More Merry-Go-Round." They therefore knew, or should have known, that the copyright ownership of the article belonged to the petitioner.

The printers and publishers are answerable to the petitioner for Pearson's and Allen's plagiarism, for the article was copyrighted by publication with notice of claim thereof and proper deposit of copies and registration was made prior to the institution of this suit for infringement, as required by the Copyright Law.

Bentley v. Tibbals, (2nd C. C. A.) 223 F. 247, 253;

Stecher Lithographic Co. v. Dunston Lithograph Co., (D. C. N. Y.) 233 F. 601, 603.

There is no evidence of any kind which even tends to show that the petitioner ever abandoned its copyright or dedicated it to public use. The allegations in that regard

by the respondents and in the opinion of the Lower Court are wholly unfounded. The article published was and is valuable property. The petitioner obtained copyright for a period of twenty-eight years by publication thereof with notice of claim of copyright thereon. The fact that the magazine suspended publication is not indicative in any way of abandonment of its rights acquired, any more than the failure of an author to write additional books would indicate that he had abandoned his property rights in those already published.

We have been unable to find and our opponents have referred to no cases dealing with abandonment of statutory copyright. The two cases cited in this connection by the Lower Court in note 11 to its opinion (R. 40) were not only decided under acts prior to the present Copyright Law enacted March 4, 1909, when deposit of copies was a prerequisite to obtaining copyright, but they do not appear to have any connection with the proposition for which they purport to be cited.

In the opinion of the Lower Court and in the contentions advanced by the respondents, it is erroneously assumed that under the Copyright Law suit for infringement of copyright cannot be instituted unless there has been *prompt* deposit of copies. They seek to justify their unwarranted position on the basis of authorities under prior copyright acts wherein deposit of copies within a specified time was a prerequisite to obtaining copyright. In fact, the very issue itself is whether *prompt* deposit of copies is a prerequisite to suit for infringement, and it is clearly demonstrated herein that copies need not be deposited *promptly* in order to maintain suit for infringement of copyright.

The Lower Court in its opinion relies heavily upon the case of *Koppel vs. Downing,* 11 App. D. C. 93, and *Weil, American Copyright Law* (1917) (R. 40). Weil in his work, pages 307-312, expresses considerable doubt as to the meaning of Sections 12 and 13 of the present Copyright Law. He sets forth arguments both for and against the construction here contended for. His conclusion is that an adjudication at an early date of the meaning of the "doubtful provisions" of Section 12 "is most desirable." The quotation from Weil in the opinion of the lower court (R. 40), should not be considered alone, but in conjunction with his entire discussion as to the meaning of Sections 12 and 13. His indicated opinion that the Copyright Act of March 4, 1909, did not remove the necessity of deposit of copies in order to obtain a copyright, colors his consideration of Sections 12 and 13. His statement of the objects of the Act fails to take into account the organic changes wrought by the Copyright Law of March 4, 1909, by granting copyright simply upon publication of the work with notice of claim of copyright thereon. *He fails to perceive* that notice to all the world is attained under the new law by publication with notice of copyright, and that the prior important requisite of deposit of copies had been relegated to a prerequisite to suit for infringement of copyright.

The case of *Koppel v. Downing, supra,* has no application to this case. It was decided in 1897 under the Act of 1891, (quoted supra page 3), which required deposit of copies as a condition precedent to vesting of copyright. The organic change wrought by the present act in granting full copyright simply upon publication with notice thereof, makes the reasoning in this decision inapplicable to the provisions in question. In the quotation from that

case by the Lower Court (R. 40), reference is made to a necessity for a "true and correct official registry." Under the present act the public is put upon notice by the publication with the statutory notice of copyright.

Sections 59 and 60 of the present Act, U. S. C. A. Title 17, appearing for the first time in the Copyright Law, empower the Register of Copyrights and the Librarian of Congress to destroy or give away copies of copyrighted material during the life of the copyright. It follows, therefore, that Congress did not intend that the Copyright Office or the Library of Congress should maintain or keep on hand all works deposited there in order to have "a true and correct official registry".

The explanation for the above sections is set forth in the House of Representatives' Report No. 2222, 60th Congress, 2d Session, pages 20 and 21, as follows:

> "Section 59 provides for a transfer of books and other articles not needed in the copyright office to certain government libraries.
>
> "Section 60 is inserted for the following reason: The Librarian of Congress states that the volume of the copyright deposits is now enormous and more than 200,000 articles a year are now being added to the great accumulation. Many of these articles are valuable to the library and are used by it. The rest remain in the cellar, and the accumulations there number two millions of articles. There are many articles there that would be useful in other government libraries. Some might be used in exchange for other articles. The remainder are a heavy charge upon the Government for storage and care, without any corresponding benefit.
>
> "The impression that the deposited articles are a part of the record and are necessary evidence of the thing copyrighted is not well founded. In the

last thirty-eight years there have been only five cases in which articles deposited have been taken into court, and it is said that in none of these cases was there any necessity for such use of the deposited article. It is believed by your committee that the suggestions of the Librarian of Congress embodied in these two sections are wise ones and that the rights of all parties interested are carefully safeguarded."

It is, therefore, apparent that neither the Copyright Office nor the Library of Congress is capable of serving as a true, correct or complete "official registry", nor is intended to be such.

The Analogies Referred to in the Opinion by the Lower Court are not applicable to the case at Bar.

The Lower Court in its opinion (R. 36) expounds its rule of statutory construction and cites a number of cases in support thereof in note 4 thereunder. The cases cited are exemplary of the proposition that where a right or remedy is conditioned upon a certain requirement, that requirement must be met before the right or remedy can be availed of. This proposition is self-evident. But the issue here is, not primarily whether the condition has been complied with, but as to the existence of the condition itself as a matter of law.

In note 7 to the opinion (R. 38), the Lower Court cites several cases in dealing with the interpretation of insurance policies and of suretyship bonds. The present case is not at all analogous for it depends simply upon statutory construction, whereas the insurance policy and the suretyship bond cases cited are matters of interpretation of contracts wherein the court seeks to arrive at

the intention of the parties in the light of existing practices, customs and law. At times a court will vary a contract in the interest of public policy. Such canons of interpretation are obviously not applicable to statutory provisions because in the latter instances the law is to be interpreted in accordance with the manifest intent of the lawmaker and the purpose for which the Act is designed to meet.

In note 14 to the opinion of the Lower Court (R. 42) it is stated that "the situation in the instant case is somewhat similar to that of a reissue of a patent." But in the case of *Caliga v. Inter Ocean Newspaper Company*, 215 U. S. 182, cited by the same court in its opinion, (R. 40, note 11) it is held (p. 189) that reissue of patents is not applicable to copyright.

When the article of the petitioner was published with notice of claim of copyright thereon, the petitioner thereupon obtained a full and complete copyright thereof. Nothing remained to be done in order to vest completely in the petitioner copyright title to the article. As no intervening deficiency of copyright title existed, nor could exist, it clearly follows that no infringer could acquire any rights intervening or otherwise in the said copyright during the lifetime thereof. The fact that the copies were not *promptly* deposited and registration of copyright secured, did not effect the complete title of the copyright in the petitioner and afforded no excuse for the infringement thereof by reason of alleged intervening rights, estoppel or other special plea.

The decision of the Lower Court involves not only the protection of a copyright but the very existence thereof. A copyright is the sole right to use and publish a liter-

ary work. Its essence is its exclusiveness. Inability to enforce and protect that exclusiveness destroys the copyright itself, and avoids the language of the statute expressly bestowing that right for a period of twenty-eight years, upon publication with notice of claim of copyright. Furthermore, notwithstanding the attempt of the Lower Court to limit its decision to infringement occurring prior to filing of copies, its holding that *prompt* deposit of copies is a condition precedent to suit, must apply equally to any infringement after a tardy filing of copies. The Lower Court, in its decision, has therefore practically made *prompt* deposit of copies a prerequisite to obtaining of copyright, contrary to the Copyright Law now in force.

We, therefore, submit that the United States Court of Appeals for the District of Columbia was in error in reversing the action of the trial Court, and this Court should reverse the Court of Appeals and order the remand of the case to the trial Court for further proceedings, as set forth in the Decree of the trial Court (Rec. 29 and 30).

Respectfully submitted,

GIBBS L. BAKER,
HORACE S. WHITMAN,
LUTHER ERWIN ANGLE,
Counsel for Petitioner.